

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN
MILWAUKEE DIVISION

THE ESTATE OF LALIAH SWAYZER,) CASE NO: 2:16-CV-01703-PP-WED
ET AL.,)
) CIVIL
Plaintiffs,)
) Milwaukee, Wisconsin
vs.)
) Wednesday, November 29, 2017
DAVID A. CLARKE, JR., ET AL.,)
) (2:00 p.m. to 3:02 p.m.)
Defendants.)

COUNTY DEFENDANTS' MOTION FOR SANCTIONS
AND TO TERMINATE DEPOSITION [DKT #69];

ARMOR CORRECTIONAL'S MOTION TO STAY DEPOSITIONS
AND PROTECT WITNESSES [DKT #72];

PLAINTIFFS' MOTION FOR LEAVE TO FILE DECLARATION [DKT #104]

BEFORE THE HONORABLE PAMELA PEPPER,
UNITED STATES DISTRICT JUDGE

APPEARANCES: SEE PAGE 2

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1 Milwaukee, Wisconsin; Wednesday, November 29, 2017; 2:00 p.m.

2 **(Proceeding in progress)**

3 **MR. GENDE:** Attorney James Gende.

4 **MR. JOHNSON:** Terry Johnson appearing for Mr. Gende.

5 **MR. KNOTT:** Good afternoon, Your Honor. Doug Knott
6 and Samuel J. Leib appear for the Milwaukee County Defendants.

7 **MR. RUSSART:** Good afternoon, Your Honor. Michael
8 Russart and Jill Munson appear on behalf of Armor, its
9 employees, and Evanston Insurance Company.

10 **THE COURT:** Good afternoon. And good afternoon to
11 everyone. As I believe you all are aware, we're here this
12 afternoon to resolve, I think we have three motions pending and
13 one of them I think will take about two seconds to resolve. I
14 have Docket Number 69, which is the County Defendant's Motion
15 for Sanctions and To Terminate the Deposition of
16 Ms. Cunningham. Docket Number 72, which is Armor's Motion to
17 Stay All Depositions and Protect Witnesses from Plaintiff's
18 Counsel. And then I have Docket 104, which is the one I think
19 is fairly easily resolved, and that's the Plaintiff's Motion
20 Under 7(h) for Leave to File a Declaration Opposing Sanctions.
21 It is Mr. Cade's declaration. I'll grant that motion. The
22 declaration's been filed. I've reviewed it. So that motion I
23 think is easy enough to take care of and I'll take care of that
24 on the docket after we finish today's hearing.

25 As the parties requested when we had our phone

1 conversation on this issue, I gave everyone an opportunity to
2 fully brief the Motions for Sanctions, and I want to just
3 summarize. I've read everything that's been filed, some of
4 which, quite frankly, I think was unnecessary, but I've read
5 it. And so I want to start with the notion that everything
6 that you've provided me I have looked at.

7 The second thing I want to clarify is that I
8 understand that the County Defendants have requested three
9 forms of sanctions. The first is that I terminate the
10 deposition of Ms. Cunningham under Federal Rule of Civil
11 Procedure 30(d)(3). The second is that I preclude
12 Attorney Gende from participating in any other depositions that
13 may take place in the case. And the third is that I impose
14 monetary sanctions on Attorney Gende and I'm quoting here from
15 the motion,

16 "Including Defense counsel's fees and expenses
17 related to the deposition of Trina (phonetic)
18 Cunningham."

19 As I understand Armor's motion, I think, and Mr. Russart or
20 Ms. Munson, you can correct me, I understand that Armor's
21 motion was, in essence, similar to the request that the County
22 Defendants had made, the second request, which was the
23 preclusion of Attorney Gende from participating in any further
24 proceedings. The motion is phrased as an order to protect
25 witnesses, but as I understand it, really what it is, is a

1 request that Mr. Gende not participate in depositions. Am I
2 understanding that correctly?

3 **MR. RUSSART:** That would be correct, Your Honor.

4 **THE COURT:** All right. And am I correct that that's
5 the only relief that's being sought by Armor?

6 **MR. RUSSART:** We would also be seeking the monetary
7 sanctions, Your Honor.

8 **THE COURT:** All right. Thank you for that
9 clarification.

10 All right. So with that being said and that being
11 clarified, I am willing to give each party a brief opportunity
12 to address anything that you think you may not have covered in
13 your briefs. But let me make a couple of comments in that
14 regard to perhaps confine your discussions. The first comment
15 is that we're here today because I have been asked to impose
16 sanctions on Mr. Gende, because of what happened during the
17 deposition of Ms. Cunningham. There's a lot of water under
18 this bridge and I'll comment on that a little bit later. And
19 the fact that I got a three-inch thick binder here and many,
20 many trees have died in order for me to produce it, and I
21 didn't print out every single thing, indicates that there's a
22 lot of water under this bridge here.

23 I am not here today to decide whether people behaved
24 inappropriately at previous depositions. I am not here to
25 decide today whether or not somebody said something somebody

1 else ought to have or ought not to have been upset at. I am
2 here to decide whether or not Mr. Gende's behavior on the day
3 of Ms. Cunningham's deposition was sanctionable and, if so,
4 what the appropriate sanction is. So in regard to making your
5 remarks, I would, first of all, encourage you to keep that in
6 mind. Second of all, I would encourage you to keep in mind the
7 three sanctions that have been requested and confine your
8 remarks to discussing the appropriateness of those sanctions or
9 the inappropriateness of those sanctions.

10 Finally, I have been asked by motion to sanction
11 Mr. Gende, nobody else. I am not considering sanctions against
12 anybody else today, because there is no motion in front of me
13 asking me to sanction anyone else today. So I would ask that
14 you confine your remarks to the request that has been made,
15 which is the request to sanction Mr. Gende.

16 All right. With those ground rules having been laid,
17 I'm going to start with the County Defendants, because it is
18 the County Defendants' motion. I think that was the first one
19 that was filed. If I'm wrong about that, forgive me. But I'll
20 start with the County Defendants. So, Mr. Knott or Mr. Leib,
21 whoever is going to make the argument.

22 **MR. KNOTT:** Thank you, Your Honor. While I
23 appreciate your comments and your requests that we confine our
24 argument today, I just want to say that this is quite
25 distasteful for what occurred in the deposition and it's

1 distasteful and, frankly, sickening in the manner in which the
2 briefing took.

3 But we are here today to talk about what happened to
4 my client, Lieutenant Trina Cunningham. Regardless of what
5 happened in the deposition, she left that deposition
6 frightened, shaking uncontrollably, and crying, and requesting
7 an escort from the building, because of what an attorney did in
8 my conference room. And I think it's quite clear that this is
9 not something that was orchestrated. That this is something
10 that the Court would demand be brought to your attention. We
11 have to -- I have declined to respond to the ugliness that was
12 raised and I just assure Your Honor that I'm willing to explain
13 myself and truly believe that there's a valid basis for
14 everything I've ever -- every objection I've ever asserted.
15 But really what we're doing is we have to reject the premise
16 that a certain number of objections asserted in a deposition
17 can be a provocation or justification for intimidation.

18 So the issues before you, Your Honor, are the
19 significance of what happened and what should be done about it.
20 In terms of what happened, I heard immediately contrition. I
21 heard Mr. Gende concede that he'd lost his composure. That has
22 morphed into that he was forcefully pointing at an exhibit and
23 I'd even heard that the cap came off. It's all on film, Your
24 Honor. I won't argue what happened. But I will say it -- what
25 that film shows that has to be recognized, is that it was an

1 outburst of anger, uncontrolled anger, that it was an act of
2 intimidation to myself and to the witness, and that there was a
3 threat of physical injury. I don't think those things can be
4 disputed. And those things meet the definition of violence and
5 they meet the definition of assault.

6 And the question is, what should a Court, in
7 upholding the standards of the profession, do when there is
8 anger, a threat of violence, intimidation? I think it's
9 absolutely, unequivocally clear that Lieutenant Cunningham
10 should not have to face further questioning. She was -- I will
11 say she's a correctional officer. She's not thin-skinned. And
12 she was shaken and should not have to return to a civil
13 deposition, in which she faces a threat and lives with for
14 weeks knowing that she has to return to a conference room where
15 she felt physically threatened.

16 The question is, why would Mr. Gende be removed from
17 participation? I don't enjoy attacking, Your Honor. I don't
18 enjoy revisiting the OLR complaint that said he has no filter,
19 he can't control himself. I don't enjoy revisiting Judge
20 Randa's review of prior depositions. He found that the
21 questioning was abusive and intimidating. And, Your Honor,
22 that's -- it isn't just what happened in the Cunningham
23 deposition. This is a persistent act and Lieutenant Cunningham
24 is not isolated. We're probably looking at another 25 or 30
25 witnesses that are employees of the County that are going to be

1 deposed in this case. And they've been made aware of what
2 happened, and they can't understand it. And they need an
3 explanation and they need to know they're going to be protected
4 in their deposition. Mr. Gende has proven that even on video,
5 even when he knows it can be reviewed, he cannot control his
6 anger. Those witnesses should not have to be unprotected in
7 future depositions. I can't make a certain number of
8 objections, because Mr. Gende's going to come across the table
9 at me, because at that point he's provoked.

10 That just cannot be the standard, Your Honor. The
11 standard cannot be that if there was no physical injury, then
12 we all go home with a stern warning. I'm sorry, Your Honor,
13 that cannot be the standard for this Court. And a severe
14 sanction is necessary. And that sanction is to remove
15 Mr. Gende from this case, remove him from the depositions, so
16 that future witnesses are not threatened in this manner. Thank
17 you.

18 **THE COURT:** Thank you, Mr. Knott.

19 Mr. Russart and Ms. Munson, on behalf of Armor.

20 **MR. RUSSART:** Your Honor, thank you. I'm in
21 unfamiliar territory and that's probably why the motion that
22 was filed by Armor is awkwardly phrased.

23 **THE COURT:** I was not attempting to criticize
24 phrasing. I just wanted to make sure I understand the relief
25 that was being requested.

1 **MR. RUSSART:** Right. But the purpose of the motion
2 was to seek protection of my clients, the witnesses that my
3 client will produce in future depositions. Mr. -- you know, I
4 know there's been a lot of water under the bridge. But
5 Mr. Gende has been admonished by other judicial officers about
6 his conduct before. And we would hope that an individual would
7 take those admonishments to heart and conduct himself in a
8 professional, courteous, and civil manner. His behavior at the
9 Cunningham deposition was anything but.

10 The individuals who are being sued, the healthcare
11 providers, as well as the correctional officers, are
12 individuals, who have -- the plaintiff has alleged to have
13 caused either the fetal demise or death of an infant. These
14 healthcare providers, I can speak for my clients, take that
15 matter very much to heart. There's a segment in Fred
16 Porculas's deposition taken in this case, where he talked about
17 the emotional distress caused by the circumstances surrounding
18 the death of the infant or the fetal demise, whichever it ends
19 up being proven in this case, and how that tore at the hearts
20 of those individuals who were involved in trying to resuscitate
21 the baby and caring for the child.

22 These individuals have been sued -- I can only
23 imagine, I've never been in their shoes, but through the course
24 of my decades practicing law I've learned that they take
25 this -- some of them take it very much to heart. It is very

1 stressful circumstances. I've had healthcare providers who've
2 quit the profession after being exonerated at a trial, just
3 because of the whole circumstance of the allegations made
4 against them. This is a very difficult thing for a person to
5 go through. It's difficult then to sit for a deposition with
6 these allegations over their heads. And even under the best
7 circumstances, it's very stressful, anxiety-causing.

8 But this -- you're not going to be under the best
9 circumstances any longer. My clients are aware of what
10 Mr. Gende did. I had an obligation to share with them what
11 happened at Ms. Cunningham's deposition. And so now they are
12 going -- if Mr. Gende is continued to allow to participate in
13 depositions, even be there, they're going to have the
14 trepidation of an individual who can't control himself being
15 added to the stress and anxiety of already the circumstance of
16 being a defendant in an action where they're accused of causing
17 an injury or death. That's -- that's -- it should not be
18 allowed.

19 We have rules of civil procedure. We have rules of
20 conduct for professional attorneys. What Mr. Gende did was
21 beyond the bounds of any of that. And my clients should not be
22 subjected to the proposition that Mr. Gende can sit across the
23 table from them and cross examine them, because he has not
24 demonstrated that he can accept responsibility for what he did
25 or control his behavior. And when I say he can't accept the

1 responsibility for what he did, the excuse of Mr. Knott made me
2 do it -- I was a police officer in the City of Milwaukee for 10
3 years. I've heard that excuse from many an individual --
4 domestic abusers. I had a man tell me that he murdered a man,
5 because that man stole a potato chip from him. Somebody else
6 made him do it. This is -- that excuse in itself tells me as a
7 rational adult that Mr. Gende is in no way prepared to accept
8 responsibility and able to conform his behavior.

9 There's no going back. There's no reset button.
10 There's no mulligan. There's no do over. What Mr. Gende has
11 done is done. And the image of him doing that and the
12 understanding of the volatility of his behavior is there
13 forever as well in this case. And so I ask that the Court
14 protect my clients and protect the witnesses they'll produce
15 from Mr. Gende and sanction him to preclude him from being at
16 any further depositions.

17 **THE COURT:** Thank you, Mr. Russart.

18 Mr. Lang or --

19 **MR. JOHNSON:** I believe I'm supposed to do it, your
20 Honor.

21 **THE COURT:** Thank you. And if you wouldn't mind
22 moving the mic a little bit closer to you, Mr. Johnson,
23 because --

24 **MR. JOHNSON:** I was hoping to remember to do that.

25 **THE COURT:** Yeah, well, it's the system in this room.

1 If you don't do that, we don't pick it up.

2 **MR. JOHNSON:** I will try to confine my remarks to the
3 scope of what the Court asked us to address as closely as
4 Defense Counsel did.

5 **THE COURT:** Try harder than that even.

6 **MR. JOHNSON:** I think I should try a lot harder than
7 that. But a brief comment about the context here. What they
8 have said is that Mr. Gende is incapable of controlling
9 himself. They ignore the fact that for three days tense,
10 stress-filled depositions went through and all they can point
11 to is a five-second lapse in judgment. There is no question it
12 was a lapse in judgment, but it's five seconds in three days.
13 That is not the record of someone who has demonstrated he
14 cannot control himself. That's the first point I'd like to
15 make.

16 The second point I'd like to make is this, I believe
17 the Court needs to separate out what is properly before the
18 Court as evidentiary submissions and what is either argument
19 unsubstantiated by any submissions or inadmissible evidence.
20 As an example, there is no record before the Court to support
21 Mr. Knott's assertion that he has 25 to 30 witnesses have been
22 made aware of this and are greatly concerned about showing up
23 at other depositions. That is perhaps true, but in terms of
24 the record here, it is simply invented. There is nothing in
25 this record to show that Mr. Russart's clients are genuinely

1 concerned about anything, because none of them have submitted a
2 single affidavit to support that. That may be true. It is not
3 supported by the record. It is simply an argument without
4 support in the record.

5 And third, there is no support for many of the
6 assertions that have been made about what Ms. Cunningham
7 experienced and believes. For example, this report to the
8 Sheriff's Department, which is attached as an exhibit, is
9 hearsay and not admissible. There is no declaration from
10 Ms. Cunningham that says anything to support what they are
11 saying. She has made a hearsay statement. I, for one, would
12 be greatly interested in finding out how that statement was
13 drafted, particularly since it is at odds with the video in
14 many respects. The video simply doesn't demonstrate those
15 things.

16 So what do we have before the Court in the narrow
17 focus that the Court has asked us to address? We have a video
18 and a transcript. And the transcript is largely unnecessary.
19 What does the video show? Video shows that, whether provoked
20 or not, I've understood the Court on that subject, at some
21 point in time, Mr. Gende momentarily lost his temper. He
22 forcefully, I think would be the right word, jabbed his pen
23 toward an exhibit in front of the witness, because he thought
24 Mr. Knott was misdirecting the witness' attention to something
25 other than what he was directed -- wanted to be directed at.

1 And he did so while saying something in a louder voice than
2 we're used to hearing in a deposition. And the pen broke. Now
3 I've had pens break, sometimes under very unfortunate,
4 embarrassing circumstances many times. I don't know why that
5 pen broke, but let's indulge in the assumption it was because
6 Mr. Gende hit that table forcefully or that had something to do
7 with it.

8 Balanced against that one moment, which was followed,
9 according to the undisputed evidence, by an immediate apology
10 from Mr. Gende, a request that he could apologize to the
11 witness, they seek to deprive these Plaintiffs of the ability
12 to have their chosen counsel question witnesses from this point
13 forward. Deprive them of their choice of the attorney they
14 want, because of a -- it's not even momentary, it is a fleeting
15 instantaneous loss of judgment. Now everyone makes losses of
16 judgment. Everyone makes miscalculations. And I'm not
17 excusing Mr. Gende's. Mr. Gende doesn't excuse his. All
18 Mr. Gende has sought to do is to place this in a context, so
19 that one would understand that it is not as if out of the blue
20 he chose one day to come in and do this. That's not what
21 happened. And that's the only purpose of the background that
22 we submitted. The Court didn't find that helpful. I apologize
23 for burdening you with it. But the reason we submitted it is
24 because we don't think this act can be viewed out of context.
25 But the consequences they seek, to impose substantial

1 monetary costs, to deprive these Plaintiffs of their chosen
2 counsel forever, at least in depositions, because of one lapse
3 in judgment are completely disproportionate. There is -- if
4 you look at that video, Your Honor, there is evidence that
5 Ms. Cunningham was surprised. I suspect she was. I believe
6 everyone in the room was surprised when the pen broke. I'm
7 sure Mr. Gende was surprised when the pen broke. There's no
8 evidence that she was frightened. She didn't even get up to
9 leave, until after her lawyer said, we're going to take a
10 break. And then she got up to leave. There's no evidence on
11 that videotape that she was anything other than surprised.
12 There's no evidence on that videotape that any rational person
13 would've believed Mr. Gende was going to assault her. There's
14 no evidence on the videotape that he was even angry with her,
15 other than being angry with Mr. Knott. As a matter of fact,
16 moments before, in the very short portion of the videotape
17 that's before the Court, you can see the questioning is being
18 done in a very calm, very quiet, very professional way and the
19 witness is responding in a perfectly appropriate way. As a
20 matter of fact, she's not even confused, despite what she says
21 in her inadmissible report to the Sheriff's Department.
22 There's no evidence on the videotape that she was confused.
23 Mr. Knott chose to direct her attention to a part of it and
24 raise an objection. We can debate the validity of that
25 anytime we want, but there's no evidence of anything going

1 wrong, until Mr. Gende, for a brief moment, lost his temper,
2 and somewhat loudly pointed out what he thought was wrong and
3 hit the paper with his pen.

4 I would suggest this, let's suppose he had a more
5 high-quality pen, and he hit the paper and the pen didn't pop
6 off. Would we be here? Would anyone be suggesting that
7 because a lawyer for one second raised his voice and struck a
8 piece of paper, like I just did, forcefully, that that meant
9 that lawyer should not be allowed to participate in any further
10 depositions? That the deposition of the witness should be
11 terminated? And that even though there was no misconduct in
12 the deposition, until that second, and none is alleged, that
13 the Plaintiffs should have to reimburse the Defendants for
14 every expense they had in going through the deposition to that
15 point, when there's no criticism of his conduct? I would
16 suggest not. If I would've been there with Mr. Gende and he
17 had struck that forcefully and the pen had not popped off, I
18 would've said, hey, calm down. Whether I was an opponent or
19 not, I would've done that. But that's all there would've been
20 to it. It doesn't mean what Mr. Gende did was the appropriate
21 thing to do. We are not suggesting it was. It does mean that
22 the sanctions that are sought are completely disproportionate.

23 You should tell Mr. Gende that he misbehaved. He
24 doesn't need to be told that, but you certainly should tell him
25 that. You should tell Mr. Gende that if anything like this

1 happens in this case again, the sanctions that have been asked
2 for will be reconsidered and may well be granted. But there is
3 no basis in the law, they have cited not a single case to
4 support the idea that what happened here warrants these kinds
5 of sanctions. There is no support in the law that they've ever
6 cited. There is no basis to impose these sanctions. Thank
7 you.

8 **THE COURT:** Thank you, Mr. Johnson. Any very brief
9 rebuttal, Mr. Knott?

10 **MR. KNOTT:** Thank you, Your Honor. I suspect that if
11 Mr. Johnson's client were shaking uncontrollably and crying and
12 unable to continue the deposition, that we would be here, Your
13 Honor. Whether it's the Plaintiffs' attorney or Defense
14 attorney, when a witness can't continue because of the conduct
15 of a witness -- of an attorney, then the Court needs to know
16 about it. I wish that the Plaintiffs had raised or Mr. Gende's
17 counsel had raised any concerns about admissibility of
18 Ms. Cunningham's statement. I'll just submit to you that, one,
19 if I had in any way orchestrated her statement, my name
20 would've been spelled correctly.

21 And, two, I think Mr. Johnson is making a legalistic
22 argument, breaking down the submissions and saying we haven't
23 cited a case. Your Honor, this is common sense, that when
24 there is an assault, an act of violence, an act of
25 intimidation, severe sanctions are necessary. And you don't

1 time it on a stopwatch. You don't say, well, the threat only
2 lasted five seconds; therefore, what the attorney did was
3 acceptable. It was momentary, and it was frightening, and it
4 was unprofessional. And the Court needs to address it. Thank
5 you.

6 **THE COURT:** Any brief rebuttal, Mr. Russart?

7 **MR. RUSSART:** Your Honor, if the Court needs any
8 assurances to the impact that this behavior had on
9 Ms. Cunningham, Ms. Munson was present at the deposition. She
10 went into the room where Ms. Cunningham went after she left the
11 conference room and can testify as to what she saw the effect
12 was on Ms. Cunningham. I don't think that should be in
13 dispute. But if the Court needs some further assurances of the
14 impact of this behavior, Ms. Munson is here. That's all.

15 **THE COURT:** Thank you. No, I don't need any
16 testimony. Okay. So speaking of the way that people sometimes
17 react under stress and in stressful situations, I will ask you
18 all's forgiveness for the fact that this hearing is taking
19 place at the end of what has been a long day of criminal
20 sentencings. It's my sixth hearing of the day. I know that's
21 not a lot for State Court. This is shameful to me. This is
22 shameful that we're sitting here having this conversation in
23 this room, in this courthouse.

24 So I was a theater major in undergrad. My parents
25 were heartbroken, you might imagine, because they were pretty

1 sure I was not going to be able to feed myself for the rest of
2 my life. And I went to law school and I managed to get through
3 it and actually earn a degree. And my parents, as I'm sure
4 many of your parents were, were sort of awestruck that I had
5 managed to get myself into a career that they considered to be
6 sort of at the pinnacle of professional success. My parents,
7 maybe some of your parents are too, are those people who think
8 that doctors and lawyers and university professors are --
9 that's just a world that's kind of a different planet from the
10 one that the rest of us inhabit at our different jobs. And I
11 think part of the perception -- part of the reason that a lot
12 of people feel that way, maybe not just my folks do, but maybe
13 a lot of people do is because we're supposed to operate under
14 this self-imposed, self-enforced code of ethics and civility.
15 And they don't always have at John Deere a code of conduct that
16 says people shouldn't be getting into a fist fight in the
17 lunchroom. We operate on a pretty high-level code, or we're
18 supposed to, of how we're supposed to treat each other, how
19 we're supposed to treat our clients, how we're supposed to
20 treat the litigants that we come across every day.

21 It's rare that I see a case, that I've ever seen a
22 case in my career, that didn't have some level of tension to it
23 and stress to it. Maybe sometimes we hit things in Traffic
24 Court that everybody isn't quite worked up about. But
25 certainly, when you get to Federal Court the stakes are high,

1 the tensions are high, emotions run high. This kind of case is
2 an emotionally-laden one, as every single one of you knows and
3 all of you have dealt with before. That is as it should be.
4 But that does not mean that attorneys, even in stressful
5 situations, get to check their tickets at the door and start
6 acting like fourth graders in a lunchroom.

7 The first thing that concerns me and the first reason
8 that I find this, I agree with Mr. Knott's word, distasteful,
9 that all of you grown-up, educated, smart, decent human beings
10 are sitting here in a hearing like this, is that the one thing
11 that was accomplished by the seven forests of paper that you
12 all provided was that it demonstrated to me at least that there
13 is an ongoing, and what I might describe as a little bit of a
14 toxic relationship between Mr. Gende and Mr. Knott. Both of
15 you are very experienced in what you do. Both of you very good
16 at what you do. And the consequence of that is that you have
17 ended up in rooms across from each other or next to each other
18 an awful lot of times it appears. I've got, again, half the
19 Amazon to prove it. And each of you seems to have pointed to
20 or relied upon excerpts of what one transcript or another from
21 one deposition or another to say see, he doesn't behave
22 himself. See. See.

23 Now I will confess to you, I myself have never
24 conducted a deposition. So this is a little bit like your
25 priest doing marriage counseling. However, I've reviewed a ton

1 of depositions over my career and one of the things that I have
2 seen with some frequency is that there tends to be a particular
3 etiquette. Everybody knows there's no judge in there.
4 Everybody knows there's nobody to bring a hammer down.
5 Everybody should know that there's no such thing as refusing to
6 answer a question. Everybody should know that the point is to
7 make your objection and move on. And I see many depositions
8 where opposing counsel says, objection, hearsay. Objection,
9 irrelevant. Objection, overly broad. And counsel says noted
10 and then moves on and asks the next question or poses the
11 question again.

12 I have also had, as I am sure almost all of my
13 colleagues have had at one point or another, with perhaps one
14 exception, phone calls from attorneys saying we're sitting in
15 the middle of a deposition. We've come across a problem that
16 we can't resolve ourselves. Wondering if the judge has a
17 minute. And if I'm there and I'm available, I'll take it. And
18 if I'm not, the parties either decide to reconvene the
19 deposition at some other time or to wait and see if I'm
20 available or whatever they decide to do. What I saw from the
21 transcripts that were provided in this case was a pattern of
22 behavior, quite frankly, on the part of both experienced
23 counsel of arguing with each other on the record, disagreeing
24 with each other on the record. There are several passages that
25 I could pick out and read to you right here and now where the

1 witness must have been sitting there watching the ping-pong
2 game for a few minutes while there was a back and forth between
3 the two of you. There were snide comments about questions that
4 each of you asked the other's witnesses.

5 Something has gone awry in this relationship and it's
6 not productive. And it doesn't seem to reflect well or be
7 flattering on either of you, not in terms of your skill as
8 counsel, but in terms of the way that you have developed of
9 dealing with each other. And that in my mind, I don't get to
10 tell you whether you ought to be embarrassed or not, but it is
11 embarrassing to read. Counting the number of objections that
12 the counsel for the other side made, pointing back and forth at
13 each other. This is something that I don't care how passionate
14 you are about your cause or your clients, and you should be,
15 this should not be what educated, respected professionals do.

16 You've got a problem, call the judge. You got an
17 objection, state it and then move on. You get 3,000
18 objections, you take a deep breath and sigh and say, I think
19 we're not getting anywhere. Why don't we give the judge a
20 ring? You get two objections that you think are so out of line
21 that they shouldn't have been made, let's take a break. See if
22 the judge is available. You don't do this. You don't snipe at
23 each other. You don't produce hundreds of hundreds of hundreds
24 of pages of see I told you so, he was not behaving himself.

25 I said earlier that we're not here to decide any of

1 that stuff, but I can't help but comment on it, because it
2 seems to have gotten us to the point that we are now. Second
3 of all, Mr. Johnson noted that one can't view the moment on the
4 videotape, which by the way, I've watched more than once, in a
5 vacuum. And that in the very shortest term, this incident took
6 place at the end of a series of several days of depositions,
7 which were stressful and tense. And I don't have any doubt
8 that that's the case. I am sure that that is true. Given the
9 past history, I'm guessing that these depositions, when the two
10 of you are there, are often fraught and tense.

11 I also noted a couple of other things in the
12 depositions. I know that many of us in a small town in
13 Milwaukee end up on cases with the same people over and over
14 and over again, especially if you have an expertise and a
15 specialty in a particular practice area. Can't help but
16 happen. I was a criminal lawyer for years. I saw the same
17 people over and over and over again. You get to know each
18 other and occasionally in court you -- you refer to Mike or Ted
19 or Jane, instead of Mr. Smith or Mr. Johnson or whoever. It
20 happens to the best of us. I'm embarrassed to say on one
21 occasion I have referred to an attorney, prosecutor or defense
22 attorney, who I know from my old days by their first name in
23 court and then had to correct myself. But I noticed a trend in
24 these depositions as well of you all addressing each other by
25 first name, of telling each other to calm down, of commenting

1 on each other's behavior, again, in front of witnesses.

2 All of that is concerning to me in the context of
3 where this case is headed and in the context of my assumption
4 that there will be other cases that you will be on together.

5 As to this particular incident and this incident is the only
6 thing that I am here to consider sanctions on, as I indicated,
7 I watched the video a few times. I think that some of the heat
8 in the rhetoric has blown over into heat of the arguments about
9 the incident.

10 What I saw in the video was a series of questions.
11 Ms. Cunningham answering the questions or attempting to answer
12 the questions, occasionally hesitating. Either trying to
13 figure out what the question was or figure out what the answer
14 was. And then Mr. Gende pose a question. Tone of his voice
15 was a little frustrated. Mr. Knott interpose what was going to
16 be either a question or a clarification. I think it was a
17 question. Where on the form are you talking about? Where on
18 the flowchart are you talking about? And then Mr. Gende comes
19 up out of his chair, leans over the table, takes the pen, slams
20 it rather forcefully down onto the pad, and some bits and
21 pieces fly in different directions. Ms. Cunningham leans back
22 and her eyes get kind of big. Mr. Knott leans back. And then
23 there begins to be an exchange, not involving the witness, but
24 between Mr. Knott and Mr. Gende arguing over the behavior that
25 had just occurred. Including, as Mr. Knott has indicated,

1 Mr. Gende saying after there was a break I think, I apologize
2 and if you bring the client back in here I'll apologize to her
3 as well. But certainly a heated exchange before that.

4 We're talking semantics here, but I wouldn't
5 characterize what Mr. Gende did as a lunge across the table. I
6 think he leaned across the table. I perceived as I watched the
7 video that Mr. Gende's anger was directed, and I think it was
8 anger, it was directed at Mr. Knott and his frustration was
9 directed at Mr. Knott. Because Ms. Cunningham hadn't done
10 anything. I don't know that Ms. Cunningham necessarily knew
11 that. I can't get in her head and I don't think that's the
12 point of my being here. I can certainly imagine if I were
13 sitting in the chair and some guy I didn't know in a tie, who
14 was supposed to be asking me questions comes across the table
15 towards me and slams the pen down I'd have a reaction to it.
16 But I think some of the language that's been used to
17 characterize the incident is a bit incendiary.

18 I think there's been a lot of discussion about the
19 impact of what happened in that incident on other witnesses,
20 who stand in line yet to be deposed. And Mr. Russart indicated
21 that he had an obligation to tell all of the other deponents
22 that this event had occurred. I'm certainly not an ethics
23 guru. There are other people who are far more schooled in
24 Supreme Court rules than I am. I'm not familiar with the
25 source of that ethical obligation. So if other witnesses are

1 aware of what happened in that deposition it is because they've
2 heard about it secondhand and not because they were present or
3 they themselves were subject to any of this kind of behavior.
4 And so I'm not sure that it's necessarily the case that every
5 single other witness had to be informed of this incident and
6 now those people are all reluctant to be deposed. I think most
7 people are reluctant to be deposed regardless of who's deposing
8 them. Nobody wants to go to a deposition or be deposed.

9 So with regard to all of those things, I think where
10 that brings us is what to do about behavior that I certainly
11 agree, and I certainly hope Mr. Gende agrees is unacceptable
12 under any circumstances. Every single one of you will be in a
13 deposition again in which you will become frustrated and
14 angered and irritated. If you can't figure out how to manage
15 that without controlling your physical responses, then
16 that's -- this is not a job you should have. Just like I
17 shouldn't have this job if I can't do my job without coming
18 over the bench at somebody, without throwing that gavel.

19 Mr. Johnson made reference to the fact that Mr. Gende
20 has been retained by his client. They made a choice as to the
21 attorney that they wanted. And while people don't have an
22 unfettered right to have any attorney no matter what, it is
23 important in our system that people be able to have counsel
24 that they can trust and who they feel is fighting for them and
25 will do a good job for them. And I have no doubt that

1 Mr. Gende's clients retained him because they believe that he
2 is talented at what he does and experienced at what he does.
3 And that's why they made that choice. Not to say that other
4 people in the firm are not also talented and experienced at
5 what they do, but I suspect that is the case with them. And so
6 it is no small thing for someone to ask me to bar an attorney
7 from being able to participate in any further depositions in a
8 case in which that attorney has been retained by people who
9 have put their faith in that attorney.

10 At the same time, the Defendants are absolutely
11 correct that I cannot condone the behavior that took place on
12 that day. It was a momentary lapse of judgment, I understand
13 that, but something needs to change in the tenor of these
14 interactions.

15 With regard to the motion -- motions plural, I have
16 to start with Rule 30(d)(3)(A) under the Federal Rules of Civil
17 Procedures, which indicates that,

18 "At any time during a deposition a deponent or a
19 party may move to terminate or eliminate the -- limit
20 the deposition, if it's being conducted in bad faith
21 or in a manner that unreasonably annoys, embarrasses,
22 or oppresses the deponent or party."

23 Under that standard, I think the behavior that was caught on
24 the video does unreasonably annoy, embarrass or oppress the
25 other party. That rule provides that the Court may, and the

1 language you will note is discretionary, terminate the
2 deposition if the Court believes that it is appropriate.
3 Getting into a discussion of what Ms. Cunningham did or didn't
4 feel I don't think is any of our purview, but I do agree that
5 it is inappropriate to subject her to any further deposition,
6 given the circumstances. And I will grant the motion to the
7 extent that one of the sanctions that is requested is to
8 terminate Ms. Cunningham's deposition.

9 Section B of that rule provides that not only do I
10 have the discretion to terminate the deposition, but that I
11 have the discretion to decide on an award of expenses. And it
12 refers to Rule 37(a)(5). 37(a)(5) provides that if I grant a
13 motion to terminate a deposition or if there's some other sort
14 of disclosure that I require, the Court must,

15 "After giving an opportunity to be heard, require the
16 party or deponent whose conduct necessitated the
17 motion to pay the movant's reasonable expenses
18 incurred in making the motion, including attorney's
19 fees."

20 The request in the County Defendants' motion is a request that
21 I require as a sanction that Mr. Gende pay the fees and costs
22 associated with conducting the deposition. The rule does not
23 provide for that as a sanction. As I understand it, this was a
24 lawfully called deposition and appropriately noticed. And
25 while the parties may disagree with each other about how well

1 it was going up until the moment of the pen incident, it was a
2 deposition that was appropriate for this case. So I do not
3 think that it is appropriate to grant as a sanction fees and
4 costs for the deposition. I do think that it is appropriate to
5 grant fees and costs for filing these motions and I will grant
6 that as a sanction and ask that the Defendants submit jointly
7 one bill of costs, please, rather than two. I think that would
8 be more efficient for -- and then, of course, I'll give the
9 Plaintiff an opportunity to respond to the bill of costs.

10 Our local rules for this Court, General Local Rule
11 83, indicate that attorneys that practice here in the Eastern
12 District of Wisconsin are subject, of course, to the FCRs but
13 also, they state that,

14 "After notice and an opportunity to be heard, any
15 attorney who violates the standards for the Eastern
16 District may be barred from practice before the
17 Court, suspended from practice for a definite time,
18 reprimanded, or subjected to such other discipline as
19 the Court may deem proper."

20 I certainly think that a bar from practice would be
21 disproportionate as a sanction under these circumstances. Not
22 trivializing in any way Ms. Cunningham's experience. And in
23 this case, at this point, under these facts, I do believe that
24 it is a disproportionate response to bar Mr. Gende from
25 participating in any further depositions. I'm going to comment

1 more on that in just a minute. But I believe that is a
2 disproportionate response and a disproportionate sanction.
3 Because, as I indicated earlier, the Plaintiffs have chosen
4 Mr. Gende as their counsel. Hopefully, not because they
5 anticipated that he would be overly aggressive, but because
6 they hoped that he would do a good job for them and also
7 because, as Mr. Johnson correctly notes, so far, while we can
8 debate the back and forth between counsel, this is the only
9 incident of this sort that took place. So I am not going to
10 grant the motion jointly made by Armor and by the County
11 Defendants to bar Mr. Gende from participating in any further
12 depositions.

13 But on that point, I have a couple of other comments.
14 My first comment is that this is not the first issue of concern
15 that's come up in this case with regard to Mr. Gende. I'm not
16 going to comment on what happened with Judge Randa or didn't
17 happen with Judge Randa. I can read that stuff as well as you
18 all can. I wasn't there. I didn't see it. I don't know. I
19 will comment on two things here. Back when we were getting
20 ready for the Rule 16 conference an issue arose in which there
21 was a dispute between the parties as to the location of
22 depositions, where those depositions would take place.
23 Mr. Gende argued, in fact in a written 26(f) statement to me,
24 that Federal practice was that the plaintiff got to decide
25 where the depositions would take place. Said that that was

1 Federal practice and cited to a decision from Judge Randa. The
2 decision that he cited from Judge Randa, which I think was the
3 Perez Decision, said exactly the opposite and that was a case
4 in which Mr. Gende was involved. So Mr. Gende would have a
5 reason to know what that case said. And in point of fact the
6 Federal practice is the opposite. That concerned me and I
7 think I said something about it at the time. And I, in fact,
8 ruled that no, we weren't going to have depositions in
9 Mr. Gende's location. We were going to follow the Federal
10 practice.

11 In the e-mail exchanges that followed this incident
12 at Ms. Cunningham's deposition, which you all also provided me
13 and which, quite frankly, didn't improve matters any, at one
14 point Mr. Russart, I think, indicated that until all these
15 matters were resolved Armor did not want Mr. Gende coming to
16 them to conduct any depositions. That exchange got pretty
17 heated, if e-mail can get heated and I reckon it can. And at
18 one point, Mr. Gende said, well, if you'd rather, you can come
19 to my place and do the depositions if you'd feel more
20 comfortable. That struck me as a little bit of a, for those of
21 you who know the Uncle Remus stories, tar baby in the briar
22 patch. Mr. Gende originally wanted the depositions to be
23 conducted in his offices and I said no. And then as a solution
24 for a problem created by Mr. Gende's behavior, Mr. Gende
25 suggested that people do the depositions at his offices.

1 Disingenuous I think.

2 The other incident that took place that concerned me
3 in this case was, as you all know, around this situation where
4 I think I noted at the Rule 16 conference, that I have noted to
5 everybody who comes in here and does a Rule 16 conference, that
6 if you run into any discovery troubles and you need help from
7 the Court, get on the phone with both parties on the line and
8 let us know that you need something and if I'm available, I'll
9 come take the call right then and there. And as you all will
10 recall, we ended up in a hearing where it turns out that
11 Mr. Gende called and asked for a hearing on what had happened
12 or some sort of hearing, I don't know exactly what the request
13 was, but at least my staff who took the phone call got the
14 impression that everybody was in agreement about the need to
15 discuss a discovery matter by phone. You all will recall that
16 when I got out here on the bench and you all were all on the
17 telephone, that's when I learned that, in fact, Defense counsel
18 were not in agreement on trying to resolve anything by phone.
19 Perhaps that was a misunderstanding and I'll certainly try to
20 give the benefit of the doubt.

21 But I'm going to tell you right now that in allowing
22 Mr. Gende to continue conducting depositions, this case is not
23 going to proceed the way it has. There are not going to be
24 anymore arguments with each other on the record in deposition.
25 I assume that all of these are going to be videotaped. They

1 certainly should be. If there is any incident that comes up at
2 any deposition, the appropriate thing to do is to pick up the
3 phone and call my chambers. If I am not available, I will
4 notify other people, perhaps one of the Magistrate Judges will
5 be available. I will make sure that there is someone available
6 to take the phone call, if not that minute, within a few
7 minutes.

8 I expect that parties who have objections to
9 interpose during a deposition will do this: Objection,
10 hearsay. Objection, overly broad. Objection, irrelevant.
11 Whatever your objection is and then move on. No speaking
12 objections. No arguments. No characterizing the other side's
13 behavior as being this, that, or the other thing. Forgive me
14 if you feel that constrains your creativity. In this case I
15 think it is necessary. And if there is a devolvement into
16 something like that, the next thing that will happen is a phone
17 call. If I have to look at the videotape of every single
18 deposition in this case, which means I'll be up at 4:00 in the
19 morning, I guess that will assist me in my need to fight
20 insomnia. I'll do it.

21 This case needs to proceed forward in an appropriate
22 and a professional manner. Witnesses should expect that when
23 they show up they will be treated with respect. Counsel should
24 expect that no matter what has happened before now each will be
25 treated with respect by the other. If there is another loss of

1 control, then I will consider more extensive sanctions,
2 including preclusion or bar.

3 Mr. Knott anything further or any further questions
4 from the Defense?

5 **MR. KNOTT:** No, Your Honor.

6 **THE COURT:** Mr. Russart?

7 **MR. RUSSART:** No, Your Honor.

8 **THE COURT:** Mr. Johnson?

9 **MR. JOHNSON:** No, Your Honor. Thank you.

10 **THE COURT:** Then just so I'm clear, I've granted
11 Docket Number 69 to the extent that I am imposing the sanction
12 of terminating Ms. Cunningham's deposition and imposing
13 attorneys' fees and costs for the filing of these motions. I'm
14 lifting the stay for conducting depositions and will allow the
15 parties to resume scheduling those depositions under the
16 conditions that I just laid out. And I am denying motion --
17 Docket Number 69 with regard to the request to bar Mr. Gende
18 from participating in further depositions.

19 The same is true with regard to Docket Number 72.
20 I'm granting the motion with regard to the request for fees and
21 costs and to the extent that, as Mr. Russart said, it's phrased
22 as a request that witnesses be protected, I think I've granted
23 that motion. I haven't granted that motion by barring
24 Mr. Gende from conducting depositions, but I fully intend to
25 protect witnesses. And I hope that this order will assist in

1 doing that. Again, with regard to Docket Number 72, lifting
2 the stay and allowing the parties to proceed with scheduling
3 depositions.

4 And then finally, as I indicated at Docket Number
5 104, I will grant the motion for Mr. Cade's declaration to be
6 filed and it's already on the docket. So I think that is a
7 done deal.

8 Finally, I know that there are two other motions, 100
9 and 101, pending in front of Judge Duffin and I assume that
10 those are proceeding apace in front of Judge Duffin. Thank you
11 all for your time. And you know my phone number.

12 **(Proceeding adjourned at 3:02 p.m.)**

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CERTIFICATION

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.

A handwritten signature in black ink, appearing to read "Toni I. Hudson".

January 3, 2018

TONI HUDSON, TRANSCRIBER